



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 136 OF 2014

INTER DUNIA COMPANY LIMITED.....1ST APPLICANT

JANE NDUTA NGIGE.....2ND APPLICANT

VERSUS

DAUDI VELE.....RESPONDENT

RULING

1. The application dated 29th August, 2014 seeks orders that:

(1) *spent*

(2) *That this Honourable Court do grant the Applicants leave to file an Appeal out of time.*

(3) *That the Draft Memorandum of Appeal herein be deemed as properly filed.*

(4) *That a stay of execution do issue against the Warrants of Attachment of Property in execution of Decree for money dated 21st August, 2014 addressed to Kande Auctioneers pending the hearing and determination of this appeal.*

(5) *That costs of the suit be provided for.*

2. According to the affidavit in support, Judgment was entered in SRMCC Kithimani No. 38 of 2012 against the Applicants on the 17th July, 2014 for a decretal sum of Ksh 690,177/= plus costs and interests. The Applicants blame the delay in filing the appeal on the lower court's failure to avail them the certified copies of the proceedings and judgment in time. It is further deponed that the Applicants' goods have already been proclaimed by the auctioneers hence their seeking the orders of stay.

3. The application is opposed. It is stated in the replying affidavit that the Applicants only rushed to court after their goods were proclaimed. That the delay has not been explained. That a draft memorandum of appeal has been exhibited herein and there was therefore no reason for failure to file the intended appeal within time.

4. The application was disposed of by way of written submissions which I have duly considered.

5. The principles of the law to be considered on whether or not to allow an application to extend the time within which to appeal are settled. See for example **Barclays Bank of Kenya Ltd vs Martha Karwirwa Antony (2010) eKLR** where the Court of Appeal cited with approval the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. 225 of 1997** where it was stated as follows:

“the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly, the reason for the delay, thirdly, possibly, the chances of the appeal succeeding if the application is granted, and fourthly the degree of prejudice to the Respondent if the application is granted.”

6. The judgment the subject of this appeal was delivered on 17th July, 2014. The application herein was filed on 2nd September, 2014. The delay is not inordinate and has been explained.

7. Under **Order 42 rule 6(2)** -

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

8. The attached memorandum of appeal shows that the judgment of the lower court is contested both on liability and quantum. If execution proceeds, the Applicant’s appeal will be rendered nugatory if the appeal succeeds.

9. The Applicants filed a further application dated 29th May, 2014 seeking a stay of execution following a re-issuance of warrants of attachment by the auctioneers following the expiry of the interim orders of stay that were initially issued herein. The application was opposed. However, the court issued further interim orders of stay pending the hearing and determination of the application dated 29th August, 2014 on merits. This court is enjoined by Article 159 of the Constitution to determine cases on merits without undue regard to technicalities of procedure.

10. This ruling on the application dated 29th August, 2014 therefore renders the application dated 29th May 2014 as overtaken by events.

11. For the above stated reasons, the court is inclined to exercise discretion in favour of the Applicants and allow the application dated 29th August, 2014 on condition that the Applicants do deposit the decretal sum in court or in an interest earning account of the counsels for both parties within 14 days from the date hereof, in default execution to issue. The Applicants to meet the costs of both applications.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 18th day of June, 2015

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B. THURANIRA JADEN

JUDGE